

Hon. Andrew J. Guilford, Ret.
Judicate West
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Special Master

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE: TOLL ROADS LITIGATION
PENNY DAVIDI BORSUK; DAVID COULTER;
EBRAHIM E. MAHDA; TODD QUARLES;
TODD CARPENTER; LORI MYERS; DAN
GOLKA; and JAMES WATKINS on Behalf
of Themselves and All Others Similarly
Situated,

Plaintiffs,

v.

FOOTHILL/EASTERN TRANSPORTATION
CORRIDOR AGENCY; SAN JOAQUIN HILLS
TRANSPORTATION CORRIDOR AGENCY;
ORANGE COUNTY TRANSPORTATION
AUTHORITY; 3M COMPANY; BRIC-TPS
LLC; RHONDA REARDON; MICHAEL
KRAMAN; CRAIG YOUNG; SCOTT
SCHOEFFEL; ROSS CHUN; DARREL
JOHNSON; LORI DONCHAK; COFIROUTE
USA, LLC; and DOES 3-10, inclusive

Defendants.

Case No. 8:16-cv-00262 ODW (JCGx)

(JW Reference No.: A267204)

**SPECIAL MASTER'S REPORT AND
RECOMMENDATION REGARDING MOTION FOR
PRELIMINARY APPROVAL OF TWO CLASS ACTION
SETTLEMENTS (DKT. NO. 585)**

1 Eight plaintiffs, on behalf of themselves and others similarly situated, filed this lawsuit
2 challenging the operation of certain California toll roads. Defendants are the transportation
3 agencies in charge of those toll roads, and some of those agencies' employees and contractors.

4 After many years of protracted litigation, the retirement of the original District Judge
5 presiding over the matter, and his reappointment by the honorable Otis D. Wright as a Special
6 Master in this matter, Plaintiffs have now moved unopposed for preliminary approval of two
7 class action settlement agreements. (Dkt. No. 585.)

8 Judge Wright appointed this Special Master to
9 consider[] and recommend[] whether to approve, on preliminary and final
10 bases, all proposed class settlements reached in this case, the notice plan
11 including the proposed notice of the proposed settlements to be disseminated
12 to members of the settlement class, and any administrative fees, attorneys'
13 fees and costs, and service awards pursuant to Federal Rule of Civil Procedure
14 23.

15 (Dkt. No. 82 at 1.)

16 The Special Master held a hearing on the motion on December 10, 2020. Before the
17 hearing, the parties were provided with a tentative ruling regarding the materials presented. The
18 Special Master commends counsel on their professionalism and preparedness at the hearing.
19 The Special Master focused the majority of the 90-minute hearing on extensively inquiring into
20 specific details of the parties' proposed settlements. The Special Master held a follow-up
21 telephonic conference with the parties on December 28, 2020 to address a few additional
22 outstanding matters. The parties also submitted some further written materials and information
23 at the Special Master's direction. The Special Master appreciated the candor and
24 thoughtfulness counsel presented in responding to questions and comments at both hearings.
25 This report and recommendation now reflects some of those discussions with counsel, as well
26 as counsel's later submissions.

27 The Special Master has now considered all materials presented, and **RECOMMENDS**
28 **GRANTING** the motion for preliminary approval.

1 **1. BRIEF BACKGROUND**

2 This lawsuit concerns two sets of Southern California toll roads. One set of toll roads,
3 referred to here as the “TCA toll roads,” covers California Highway Routes 73, 133, 241, 261. It
4 is operated by the Foothill/Eastern Transportation Corridor Agency and San Joaquin Hills
5 Transportation Corridor Agency (collectively, “TCA entities”). The other set is operated by the
6 Orange County Transportation Authority (or “OCTA”) and is commonly referred to as the 91
7 Express Lanes.

8 Plaintiffs—Penny Davidi Borsuk, David Coulter, Ebrahim E. Madha, Todd Quarles, Todd
9 Carpenter, Lori Myers, Dan Golka, and James Watkins—are eight drivers who have driven on the
10 TCA toll roads without paying the toll, and who then received toll violation notices and penalties.
11 Plaintiffs Golka and Coulter have also received toll violation notices and penalties for driving on
12 the 91 Express Lanes without properly paying the toll.

13 The defendants named in Plaintiffs’ operative complaint are associated with either the
14 TCA toll roads or the 91 Express Lanes. Aside from the TCA entities, the defendants sued for
15 their alleged role in the operation of the TCA toll roads (also referred to in this report as the “TCA
16 Defendants”) include: TCA employees Rhonda Reardon, Michael Kraman, Craig Young, Scott
17 Schoeffel, and Ross Chun, and TCA contractor BRiC TPS LLC. Another TCA contractor, 3M
18 Company (“3M”) is separately referenced in this report, as 3M reached a separate settlement
19 agreement with Plaintiffs that is submitted for preliminary approval here. As for the defendants
20 sued regarding the 91 Express Lanes (or the “OCTA Defendants”), they include OCTA contractor
21 Cofiroute USA, LLC, and OCTA employees Lori Donchak and Darrel Johnson. The OCTA
22 Defendants are not involved in the currently-pending motion and its two proposed settlements.
23 However, counsel for OCTA Defendants participated in the December 10, 2020 hearing and a
24 motion for preliminary approval of a settlement agreement between Plaintiffs and OCTA
25 Defendants is expected soon.

26 Broadly speaking, Plaintiffs’ putative class action challenged the amount of the penalties
27 Defendants charge, and Defendants’ enforcement and collection practices. The second group
28 of claims particularly called into question Defendants’ efforts to provide notice of the penalties

1 assessed and the underlying tolls, and Defendants' practice of sharing drivers' personally
2 identifiable information (commonly referred to as "PII") with third parties.

3 As mentioned, Plaintiffs now seek preliminary approval of two class settlements: one
4 with the TCA Defendants and a separate one with 3M. The Special Master considers each of
5 those proposed class settlements in this report.

6 **2. CLASS CERTIFICATION**

7 A class was previously certified in this case for the litigation of claims under California
8 Streets and Highways Code § 31490. That class was defined as:

9 All consumers who used California Highway Routes 73, 133, 241, 261 between
10 April 13, 2015 and now, or who used the 91 Express Lanes between June 29,
2015 and now, and:

- 11 • Who had their travel pattern data (date and time of trip, or plaza and
12 lane numeric identifiers) made available by Defendants to another
transportation agency;
- 13 • Who had the date of their toll transaction or violation sent to the
California DMV;
- 14 • Who had their license plate numbers sent by Defendants to the
California DMV for a second inquiry, the Arizona DMV, DataTicket
15 Incorporated, Law Enforcement Systems, LLC (Duncan Solutions);
- 16 • Who had any personally identifiable information other than the
amount of tolls and penalties owed, the violation number, or the
17 violator's account number sent by Defendants to Linebarger Goggan
Blair & Sampson LLP;
- 18 • Who, without providing express written consent to receive
communications about the products or services offered by a
19 transportation agency or a transportation agency contractor, had any
personally identifiable information sent by Defendants to Marshall
20 Advertising; or
- 21 • Who had any personally identifiable information sent by Defendants
to a car rental company, LexisNexis, Julinne von KleinSmid,
22 Microbilt, Experian, the California FTB, Rex L. Brady Attorney at Law,
Judgment Recovery Assistance, or iconcontact.

23
24 (Dkt. No. 501 at 19–20 ("Class Certification Order").)

25 The parties now propose two different, new settlement class definitions for a TCA
26 Settlement Class and a 3M Settlement Class. They explain that "[t]he proposed 3M Settlement
27 Class is a subset of the TCA Settlement Class" (Dkt. No. 585-1 at 14) and 3M Settlement Class
28 members are "eligible to receive relief from both settlements" (*id.* at 2).

1 They propose a definition of the TCA Settlement Class as:

2 All individuals whose PII [(“Personally Identifiable Information”)] was provided
3 by Defendants to any other individual or entity between April 13, 2015 and the
4 Settlement Class Period End Date, except as otherwise specified. The
Settlement Class consists of:

- 5 ○ Any person with a transponder account with a Toll Agency whose PII
6 was sent by Defendants to another Toll Agency between April 13,
7 2015 and the Settlement Class Period End Date (the
8 “Interoperability Subclass”);
- 9 ○ Any person who used any of the TCA Toll Roads whose PII was sent
10 by Defendants to a third party between April 13, 2015 and the
11 Settlement Class Period End Date in connection with TCA
Defendants’ efforts to collect tolls and/or penalties (the
“Collection/Enforcement Subclass”);
- 12 ○ Any person whose PII was sent by Defendants to a third party
13 between April 13, 2015 and the Settlement Class Period End Date
14 for any reason other than those listed above (the “Communications
15 Subclass”).

12 Excluded from the Settlement Class are: (1) employees of TCA Defendants,
13 including their current and former directors, officers and counsel; (2) any entity
14 that has a controlling interest in TCA Defendants; (3) TCA Defendants’ affiliates
and subsidiaries; and (4) the judge to whom this case is or was assigned, any
member of the judge’s immediate family, and any member of the judge’s staff.

15 (*Id.* at 7.) The term “Settlement Class Period End Date is defined as thirty (30) days after the
16 Court issues the Preliminary Approval Order.” (*Id.* at 7 n.3.)

17 They propose a definition of the 3M Settlement Class as:

18 All individuals whose PII [(“Personally Identifiable Information”)] was provided
19 by 3M or TCA to any other individual or entity from April 13, 2015 to June 30,
20 2015, including:

- 21 ○ Any person with a transponder account with a Toll Agency whose PII
22 was sent by 3M or TCA from April 13, 2015 to June 30, 2015 to
23 another Toll Agency (interoperability transmissions);
- 24 ○ Any person who used any of the TCA Toll Roads whose PII was sent
25 by 3M or TCA to a third party from April 13, 2015 to June 30, 2015
26 in connection with efforts to collect tolls or penalties (collection
27 transmissions); and
- 28 ○ Any person whose PII was sent by 3M or TCA to a third party from
April 13, 2015 to June 30, 2015 for any reason other than those
listed above (other transmissions).

26 Excluded from the Settlement Class are: (1) employees of Defendant, including
27 their current and former directors, officers and counsel; (2) any entity that has
28 a controlling interest in Defendant; (3) Defendant’s affiliates and subsidiaries;
and (4) the judge to whom this case is assigned, any member of the judge’s

1 immediate family, and any member of the judge's staff.

2 (*Id.* at 14.)

3 Plaintiffs explain that these "slightly different" definitions for the proposed Settlement
4 Classes are intended to address a few things. (*Id.* at 19.) First, "membership in the Settlement
5 Classes is defined based on whether the consumer's PII was shared during the Class period,"
6 rather than whether the consumer used one of the toll roads during the class period. (*Id.*)
7 Second, Plaintiffs state that after class certification occurred, "TCA identified additional third
8 parties with whom they shared PII." (*Id.* at 20.) Plaintiffs state that the Settlement Classes
9 encompass broader subclasses to ensure that all individuals are included. (*Id.*) Third, and
10 relatedly, "the six bullet points in the Class Certification Order are combined into three broader
11 bullet points in the Settlements." (*Id.* at 19.)

12 The Special Master is satisfied that the reasoning of the Class Certification Order in
13 certifying the class for litigation of Plaintiffs' § 31490 claim applies equally to Plaintiffs' two
14 proposed Settlement Classes here. The Special Master will provide an analysis of the
15 Settlement Classes in this section.

16 A plaintiff seeking class certification must first show that a proposed class satisfies all
17 four of Federal Rule of Civil Procedure 23(a)'s elements: (1) numerosity; (2) commonality; (3)
18 typicality; and (4) adequacy of representation by the class representatives and class counsel.
19 Fed. R. Civ. P. 23(a). A plaintiff seeking class certification must also show that a proposed class
20 satisfies the requirements of at least one of Rule 23(b)'s three subsections: (1) that prosecuting
21 separate actions would create a risk of inconsistent or varying adjudications; (2) that the party
22 opposing class certification has acted or failed to act on grounds that apply generally to the
23 class; or (3) that questions of law or fact common to class members predominate over any
24 questions affecting only individual members and a class action is superior to other available
25 methods for adjudicating the dispute. Fed. R. Civ. P. 23(b)(1)–(3).

26 These requirements aren't just pleading standards. *Wal-Mart Stores, Inc. v. Dukes*, 564
27 U.S. 338, 350 (2011) ("*Dukes*"). A party seeking class certification must affirmatively
28

1 demonstrate that these requirements have been met and survive a rigorous analysis that may
2 dip into an evaluation of the case's merits. *Id.* at 350–51. And the class certification analysis
3 doesn't become less rigorous because a case is headed towards settlement. Indeed, courts
4 "must pay 'undiluted, even heightened, attention' to class certification requirements in a
5 settlement context." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)
6 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)). Among other things, courts
7 must be on the lookout for improper collusion among the parties. See *In re Bluetooth Headset*
8 *Prod. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011).

9 The proposed Settlement Classes satisfy Rule 23(a)'s four elements. Defendants
10 estimate that "prior to deduplication, there are approximately 1.5 million individuals in the 3M
11 Settlement Class and approximately 14 million individuals in the TCA Settlement Class," so
12 numerosity is met. (Dkt. No. 585-1 at 20); see *Villalpando v. Exel Direct, Inc.*, 303 F.R.D. 588,
13 605–606 (N.D. Cal. 2014) ("[C]ourts have routinely found the numerosity requirement satisfied
14 when the class compromises 40 or more members."). As for commonality, the Special Master
15 concludes that the commonality requirement is met. See *Hanlon*, 150 F.3d at 1019 ("All
16 questions of fact and law need not be common to satisfy the rule."). As explained in the Class
17 Certification Order, a question common to the class includes "whether Defendants violated
18 privacy laws by sharing drivers' PII with third parties." (Dkt. No. 501 at 8 (citation omitted)). This
19 common question establishes commonality. See *Armstrong v. Davis*, 275 F.3d 849, 868 (9th
20 Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499, 504–05 (2005)
21 (explaining that courts generally find commonality where "the lawsuit challenges a systemwide
22 practice or policy that affects all of the putative class members[]"). Further, typicality is met
23 because Plaintiffs' individual claims "stem from Defendants' uniform practices." (Dkt. No. 501
24 at 9.) The Special Master also remains unaware of any conflicts between the Plaintiffs
25 representing the settlement class, Plaintiffs' attorneys, and the class. These and other facts
26 sufficiently establish that Plaintiffs and their attorneys adequately represent the class. (*Id.* at
27 10–11.)
28

1 The proposed settlement class also satisfies one of Rule 23(b)'s three subsections: Rule
2 23(b)(3)'s predominance and superiority standard. As explained in the Class Certification Order,

3 [s]ince Plaintiffs seek to recover statutory damages for the class, the central
4 issue of their § 31490 claim is determining what PII transfers violate § 31490
5 and what PII transfers fall under an exception. And since Defendants make PII
6 available according to uniform policies, resolving that central issue can easily be
7 done on a classwide basis. So common questions prominently predominate the
8 § 31490 claim.

9 (*Id.* at 12.) Ultimately, issues common to the class predominate over any questions affecting
10 only individual members and a class action is the best way to resolve this dispute.

11 During the class certification phase, Plaintiffs had asked that the class be defined based
12 on users who "had their privacy rights violated by the improper dissemination of their PII." (*Id.*)
13 The Class Certification Order redefined the proposed class to avoid a "fail-safe class" by
14 focusing on the PII transfers themselves, not whether those transfers violated privacy rights.
15 (*Id.*) Because the proposed Settlement Classes are similarly focused on the factual transfer of
16 PII, they don't raise the "fail-safe class" issues that previously required consideration.

17 At the hearing, the Special Master inquired further regarding the Settlement Classes,
18 including the fact that they define membership based on whether PII was shared rather than
19 whether an individual drove on the toll roads during the relevant time period. The Special
20 Master is satisfied that, in combination with the parties' notice distribution plan, this definition
21 is sufficient.

22 The Special Master also finds this outcome appropriate because the parties' proposed
23 settlements don't appear collusive. See *Bluetooth Litig.*, 654 F.3d at 947. Plaintiffs and the TCA
24 Defendants reached their settlement after two mediation sessions with third-party mediators
25 Robert Kaplan and Rachel Ehrlich. (Dkt. No. 585-1 at 6.) Indeed, they report that their second
26 mediation, with Ms. Ehrlich, "lasted for 19 hours concluding at 4:30 a.m. in the morning." (*Id.*)
27 Plaintiffs and 3M also reached their settlement after two mediation sessions, both with Robert
28 Kaplan, and further communications and negotiations between themselves and with his
assistance. (*Id.*)

1 This hard-fought case has also been pending for over five years. As Plaintiffs explain,
2 [t]hese settlements were only achieved after five years of hard-fought litigation
3 which included multiple Motions to Dismiss, Motions for Judgment on the
4 Pleadings, three rounds of Motions for Summary Judgment, Class Certification,
5 at 23(f) petition to the Ninth Circuit (which denied the petition), a Motion to
6 Decide Key Questions, production and review of over 500,000 pages of
7 documents, 34 depositions, expert discovery contested discovery disputes, and
8 third party depositions across the country.
9 (*Id.* at 2.) Particularly important was the Court's Order Regarding Defendants' Motion To Decide
10 Key Legal Questions. (Dkt. No. 566.) It included rulings on issues raised throughout the case.
11 The Court had long proposed to make such rulings to facilitate the advancement of the case,
12 and they ultimately affected numerous aspects of it. At the hearing, Plaintiffs' counsel agreed
13 that the proceedings related to the Key Legal Questions Order, including the Court's agreement
14 to hold the order while the parties negotiated potential settlements, were critical in the parties'
15 ability to resolve the case. For these reasons, the Special Master is more than satisfied that
16 these settlements represent a non-collusive compromise between the parties' strongly held and
17 disputed positions.

18 The Special Master thus **RECOMMENDS CERTIFYING** the proposed Settlement Classes
19 for settlement purposes only. (See *also* Dkt. No. 585-1 at 21 n.9.)

20 Eight named Plaintiffs were previously appointed to serve as class representatives, and
21 Cuneo Gilbert & LaDuca LLP, Lindemann Law Firm, APC, and Schonbrun, Seplow, Harris,
22 Hoffman & Zeldes were appointed to serve as class counsel. (Dkt. No. 501 at 18–20; Dkt. No.
23 554 at 6–8.)

24 Plaintiffs Todd Quarles' and Ebrahim E. Madha's claims against 3M were previously
25 dismissed, such that they will only serve as class representatives for the TCA settlement. (See
26 Dkt. No. 440 at 6–7.) In addition, Plaintiff James Watkins is not a party to either settlement
27 agreement, and the parties thus request that Watkins isn't appointed as a settlement class
28 representative. (Dkt. No. 585-1 at 12 n.5.) Because other class representatives remain to
represent class members' interests under both settlement agreements, the Special Master
agrees that Watkins' non-participation does not impact preliminary approval of the settlement

1 agreement. Blake Lindemann, counsel for Mr. Watkins, has also submitted to the Special
2 Master a motion to withdraw as Watkins' counsel. Of course, these papers should be filed with
3 the Court. The Special Master has reviewed the unopposed motion to withdraw and discussed
4 the issue with the parties at the December 28, 2020 status conference, including confirming
5 that Lindemann would provide notice to Watkins of the motion. Based on that review, the
6 Special Master would recommend that the motion to withdraw be granted.

7 The Special Master thus recommends that except as otherwise explained in this section,
8 the previous appointments of class counsel and class representatives in this case remain
9 provisionally appropriate as to the Settlement Classes as well. The Special Master also
10 recommends appointing Epiq Class Action & Claims Solutions, Inc. as the third-party settlement
11 administrator.

12 **3. PRELIMINARY APPROVAL OF SETTLEMENT TERMS AND COSTS**

13 A court may approve a settlement agreement only "after a hearing and on finding that it
14 is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Courts must consider various factors
15 in assessing a settlement proposal:

16 [1] the strength of the plaintiffs' case; [2] the risk, expense, complexity, and
17 likely duration of further litigation; [3] the risk of maintaining class action status
18 throughout the trial; [4] the amount offered in settlement; [5] the extent of
19 discovery completed and the stage of the proceedings; [6] the experience and
views of counsel; [7] the presence of a governmental participant; and [8] the
reaction of the class members to the proposed settlement.

20 *Hanlon*, 150 F.3d at 1026. But "the court's intrusion upon what is otherwise a private
21 consensual agreement negotiated between the parties to a lawsuit must be limited to the extent
22 necessary to reach a reasoned judgment that the agreement is not the product of fraud or
23 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as
24 a whole, is fair, reasonable and adequate to all concerned." *Id.* at 1027.

25 At the preliminary approval stage, "a court determines whether a proposed settlement is
26 'within the range of possible approval' and whether or not notice should be sent to class
27 members." *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1063 (C.D. Cal. 2010); see
28

1 also 4 Newberg on Class Actions § 13:10 (5th ed.) (the primary objective a court at the
2 preliminary approval stage is “to establish whether to direct notice of the proposed settlement
3 to the class, invite the class's reaction, and schedule a final fairness hearing.”). A “full fairness
4 analysis is unnecessary.” *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 665 (E.D. Cal. 2008). If the
5 proposed settlement “appears to be the product of serious, informed, non-collusive
6 negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to
7 class representatives or segments of the class, and falls within the range of possible approval,”
8 the court should grant preliminary approval of the class and direct notice of the proposed
9 settlement to the class. *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal.
10 2007) (citation omitted).

11 At any rate, “the decision to approve or reject a settlement is committed to the sound
12 discretion of the trial judge.” *Hanlon*, 150 F.3d at 1026. Ultimately, “[s]trong judicial policy
13 favors settlements.” *Churchill Vill., LLC. v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004)
14 (omission and quotation marks omitted) (quoting *Class Plaintiffs v. City of Seattle*, 955 F.2d
15 1268, 1276 (9th Cir. 1992)).

16 There are some moving parts to the parties’ proposed settlement agreements. The TCA
17 settlement includes “\$29 million dollars in cash, \$135 million dollars in penalty forgiveness and
18 substantial injunctive and programmatic relief (changes to TCA’s practices).” (Dkt. No. 585-1 at
19 8.) The 3M settlement includes a \$11.95 million dollar cash settlement fund. (*Id.* at 15.)

20 The Special Master turns first to listing some of the remedial measures that Plaintiffs
21 state are included in the TCA settlement. (Dkt. No. 585-1 at 8 (listing remedial measures as
22 “include[d], but not limited to.”).)

- 23 • TCA will increase the time that drivers have available to pay tolls before a Notice of
24 Evasion issues, from 5 days to 7 days.
- 25 • TCA will change their privacy policy to include lists of categories of PII sent or received
26 from various entities.
- 27 • TCA asks that the Court approve that TCA can send “(i) a single email to all account
28 holders notifying them that they have been opted out and asking them to select their

1 communications preferences in their online account; and (ii) a statement to be
2 included in any other communications that would otherwise be sent to TCA
3 customers advising them to update their communications preferences and/or
4 containing a link to a website that allows TCA customers to update their
5 communications preferences.” (Dkt. No. 585-1 at 9.) If TCA receives approval, it will
6 perform a one-time removal of “the opt-in status [] for all current subscribers in the
7 VTX system (governing opt-ins for communications by TCA).” (*Id.*)

- 8 • TCA has agreed to certain limitations on PII transmissions. (*Id.* at 9–10.)
- 9 • TCA has already “undertaken significant signage enhancement projects . . . [and]
10 provided significant revisions and improvements to its privacy policy to now disclose
11 its current collection, and sharing PII practices.” (*Id.* at 10.)

12 The Special Master recommends approving TCA’s proposal to change every account
13 holder’s status to opt out in conjunction with a single email and statements included in other
14 communications that would otherwise be sent to customers advising them to update their
15 communication preferences to opt in. The Special Master otherwise finds, at this stage, that
16 these obligations for TCA under the agreement sufficiently appear to provide “indivisible” relief
17 benefitting the class as a whole, as appropriate in a Rule 23(b)(2) class action. See *Dukes*, 564
18 U.S. at 360. As Plaintiffs’ counsel emphasized at the hearing, the parties understand these
19 remedial measures to provide significant, real relief that will benefit class members as well as
20 toll roads users generally. Moreover, these obligations substantially answer the allegations in
21 Plaintiffs’ operative pleading.

22 As noted, besides the remedial measures, the TCA settlement and the 3M settlement
23 include non-reversionary cash settlement funds. (Dkt. No. 585-1 at 1.) The TCA settlement also
24 includes substantial funds to direct towards penalty forgiveness. (*Id.*) The parties propose that
25 class notice and administration costs, the costs of the Special Master and his team, class
26 counsel’s attorneys’ fees and costs, and proposed service awards to class representatives be
27 paid out of the non-reversionary settlement funds (*not* TCA’s penalty forgiveness value), in the
28 following breakdowns:

| | TCA Defendants | 3M |
|---|----------------|--------------|
| Penalty Forgiveness Value | \$135,000,000 | -- |
| Total Initial Value of Non-Reversionary Settlement Fund | \$ 29,000,000 | \$11,950,000 |
| Proposed Attorneys' Fees and Costs (estimate – parties state they will seek “no more than” these amounts) | \$ 17,500,000 | \$ 2,990,000 |
| Class Notice and Administration Costs (estimate; shown as split equally between TCA and 3M here, but in fact will be split between them on a <i>pro rata</i> basis) | \$ 824,173 | \$ 824,173 |
| Proposed Service Awards to Class Representatives (<i>up to</i> \$15,000 per representative for TCA Settlement and <i>up to</i> \$3,000 per representative for 3M Settlement) | \$ 105,000 | \$ 15,000 |
| Costs of Special Master (<i>very upper</i> estimate; shown as split equally among TCA and 3M for purposes of this chart only) | \$ 25,000 | \$ 25,000 |

TCA's \$135 million penalty forgiveness fund will go toward Settlement Class Members with outstanding penalties. Plaintiffs explain,

[f]irst, all Participating Penalty Forgiveness Class Members will receive the lesser of the total of their outstanding penalties or \$57.50 (the equivalent of at least one penalty assessment) in penalty forgiveness. Second, the remainder of the Penalty Forgiveness Fund will be distributed to Penalty Forgiveness Class Members from those with the oldest outstanding penalties to the newest. There is no requirement to submit a Claim Form to receive penalty forgiveness, it will be electronically pushed out to Penalty Forgiveness Class Members.

(*Id.* at 8.) In response to the Special Master's questions about the penalty forgiveness fund at the hearing, Plaintiffs' counsel stated that about a million class members would receive some relief as a result of the fund. Counsel agreed that TCA has not written off these debts and has ongoing collection efforts related to these penalties. These collection efforts include DMV holds on some class members' licenses based on unpaid penalties. Plaintiffs' counsel again

1 emphasized her belief that the penalty forgiveness fund represents real, meaningful relief for
2 class members.

3 Cash payments from the non-reversionary TCA settlement fund will be distributed on a
4 pro-rata basis to Settlement Class Members “who submit valid Claim Forms **and are not eligible**
5 **for penalty forgiveness.**” (Dkt. No. 585-1 at 8 (emphasis added).) Payments from the 3M
6 settlement fund will be distributed on a pro-rata basis to each individual who submits valid
7 claim forms. (*Id.* at 15.) Members of the 3M Settlement Class are also members of the TCA
8 Settlement Class, and will be able to choose to seek claims from either or both settlement
9 funds. (*Id.* at 2.) “[U]nconfirmed claims” for either fund will receive half of the pro rata share. (*Id.*
10 at 8 n.4, 15 n.7.)

11 The Special Master has considered various factors in assessing these class settlements
12 and finds that, at this stage, the settlements are overall fair, reasonable, and appropriate. One
13 important factor is that the parties reached the settlements after significant arms-length
14 negotiations with third-party mediators. See *In re First Capital Holdings Corp. Financial Prods.*,
15 No. MDL 901, 1992 U.S. Dist. LEXIS 14337, 1992 WL 226321, at *2 (C.D. Cal. June 10, 1992)
16 (“[T]here is typically an initial presumption of fairness where the settlement was negotiated at
17 arm's length.”). Further, as noted, there has been significant discovery and motion practice in
18 this case, including regarding unique questions of the interpretation of state law.

19 The significant litigation activity in this case tends to show that the settlements are
20 based on a sufficient understanding of what’s at stake. Plaintiffs’ counsel are experienced
21 litigators and have apparently concluded that the benefits of settlement outweigh the risks of
22 continued litigation. (See *also* Dkt. No. 566 (Order Regarding Defendants’ Motion To Decide Key
23 Legal Questions, finding for some of the questions that section 31490 permits a transportation
24 agency to send certain PII to particular third parties in particular circumstances).)

25 The Special Master is also satisfied that the proposed attorneys’ fee award for the 3M
26 settlement is likely reasonable. At this point, the requested fee reflects fair compensation for
27 undertaking this complex, risky, expensive, and time-consuming class action, particularly since
28 the parties have been actively litigating this case for many years. See *Morris v. Lifescan, Inc.*, 54

1 F. App'x 663, 664 (9th Cir. 2003) (affirming attorney fee award of 33% of a \$14,800,000 cash
2 settlement); see also *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995); *Tawfilis v.*
3 *Allergan, Inc.*, Case No. 8:15-cv-00307 JLS (JCGx), 2018 U.S. Dist. LEXIS 173687, 2018 WL
4 4849716, at *7 (C.D. Cal. Nov. 18, 2014).

5 Before the hearing, the Special Master expressed some concerns about the proposed
6 attorneys' fee award for the TCA settlement. The proposed attorneys' fees represent
7 approximately 10.7% of the simple total of both the penalty forgiveness fund and non-
8 reversionary cash fund. But they will be deducted solely from the non-reversionary cash fund,
9 and \$17.5 million in attorneys' fees would represent about 40% of the total value of that fund.
10 At the hearing, the Special Master conveyed his thoughts on the matter to the parties and is
11 hopeful that Plaintiffs can either adjust the requested fee and cost amounts or provide
12 sufficient justification for the requests in their later papers to justify the majority of fees sought.

13 The Special Master also notes that the parties' proposed service awards – which will go
14 to seven of the eight Plaintiffs for the TCA settlement and five of the eight Plaintiffs for the 3M
15 settlement – appear reasonable and appropriate, given the substantial time and energy those
16 Plaintiffs dedicated to this case. The parties discussed the contemplated service awards and
17 the bases for them with the Special Master at the hearing as well.

18 The Special Master **RECOMMENDS GRANTING** preliminary approval of the class
19 settlements.

20 **4. PROPOSED NOTICE**

21 When a court certifies a class under Rule 23(b)(3), it must “direct to class members the
22 best notice that is practicable under the circumstances, including individual notice to all
23 members who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). In “plain,
24 easily understood language” the notice must “clearly and concisely” state:

- 25 (i) the nature of the action;
- 26 (ii) the definition of the class certified;
- 27 (iii) the class claims, issues, or defenses;
- 28 (iv) that a class member may enter an appearance through an attorney if the member so desires;

- (v) that the court will exclude from the class any member who requests exclusion;
- (vi) the time and manner for requesting exclusion;
- (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Id. Finally, “[n]otice is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.” *Churchill Vill*, 361 F.3d at 575 (internal quotation marks omitted).

The parties agree that a third party, Epiq Class Action & Claims Solutions, Inc., will send most class members a settlement notice via email or, if email is not available, via U.S. mail. (Dkt. No. 585-1 at 11; see *also* Azari Decl. (Dkt. No. 585-2) ¶ 11.) Members of the 3M Settlement Class will be sent a single notice that presents their options for seeking claims from both the TCA and 3M non-reversionary settlement funds. (Dkt. No. 585-1 at 15.) These notices will include the website address for a case website where individuals can find relevant documents and information, including the Complaint, the Notices, Settlement Agreements, Claim Form, and answers to frequently asked questions. (Azari Decl. ¶ 27.) Epiq will also maintain a toll-free number that Settlement Class members can call for more information. (*Id.* ¶ 28.) The toll-free number will also be prominently listed on the notices. Counsel agreed with the Special Master that all efforts should be made to avoid inquiries being presented to the Court beyond what is necessary and proper.

Plaintiffs explain that for a small portion of the Settlement Class, TCA only has individuals’ license plate numbers and/or transponder numbers. (Dkt. No. 585-1 at 28.) Plaintiffs state, “[b]ecause TCA has only the transponder number and not the names or contact information for these drivers, publication notice will be utilized. The media campaign will include a print notice in the *Los Angeles Times*, an information press release as well as internet notice.” (*Id.*) Specifically, the print notice will appear as an 1/8 page ad in the *Los Angeles Times* twice – once on a weekday and once on a Sunday. (Azari Decl. ¶ 24.) The media campaign also includes “banner notices” on (1) social networking sites, including Facebook and Instagram, and (2) advertising networks, including Google Display Network and Verizon (Yahoo) Audience Network. (*Id.* ¶¶ 19–23.)

1 The long-form notice form attached to the parties' proposed settlement agreements is
2 complex. It includes a two-page cover summary followed by ten pages with nine labeled sections
3 (with subsections for each of them). (See, e.g. Dkt. No. 585-4 at ECF51–ECF64 (Exhibit B to the
4 proposed Settlement Agreement between Plaintiffs and 3M).) The Notice provides detailed
5 information in plain English, and it sets forth, among other things: (1) the nature, history, and
6 status of the litigation; (2) the definition of the Class and who is excluded; (3) the reasons the
7 parties have proposed the settlement; (4) the amount of the settlement fund; (5) the Class's
8 claims and issues; (6) the parties' disagreement over damages and liability; (7) the maximum
9 amount of attorneys' fees and expenses that lead counsel intend to seek with final settlement
10 approval; (8) the value of the service awards that will be provided to lead Plaintiffs; (9) the plan
11 for allocating the settlement proceeds to the Class; and (10) the date, time, and place of the
12 settlement hearing. (*Id.*) The short-form post card and email notices similarly explain the
13 requisite information and provide in bold the class website and toll-free number where class
14 members may seek additional information, if they wish.

15 At the hearing, Plaintiffs' counsel explained that while the long-form notice would be
16 available on the class website and upon request, Epiq would rely on the short-form notices for
17 emailing and mailing class members. Despite the complexity of the long-form notice, which is
18 likely simply the result of the complex nature of the case itself, the Special Master's own review
19 of the proposed notice materials confirms that the documents are broken down into sufficiently-
20 labeled categories and subcategories of information, and all the elements outlined in Rule
21 23(c)(2)(B) are adequately covered.

22 At the hearing, the Special Master also explained why a simple statement of the
23 minimum potential recovery might be helpful in the summary notice. The parties agreed that
24 they would consider the Special Master's comments and advice at the hearing, including on this
25 point, in finalizing the draft notices. The Special Master emphasized that the parties should use
26 their best judgment in making the notices as accessible as possible, and trusts that the parties
27 will indeed do so.
28

The Special Master **RECOMMENDS FINDING** that the notice forms and plan comply with Federal Rule of Civil Procedure 23. The Court also appoints Epiq Class Action & Claims Solutions, Inc. as the third-party claims administrator.

5. PROPOSED INJUNCTION

Plaintiffs request that “[t]o effectuate the Preliminary Approval Order and to ensure adequate notice is provided to the members of the Settlement Classes,”

the Court permanently enjoin each and every member of each of the Settlement Classes from filing or pursuing any claim or litigation against any person or entity asserting that compliance with the obligations imposed by the Preliminary Approval Order and/or the TCA and/or 3M Settlement Agreements violates California Streets & Highways Code section 31490 or any other federal, state or local statute, rule, regulation or policy purporting to limit the disclosure of personally identifiable information.

(Dkt. No. 585-1 at 30–31.) Plaintiffs further state, “[t]he Parties believe that this is necessary to allow the Defendants to provide contact information to the administrator and not be concerned that a Class Member will bring suit claiming that the provision of their information to the administrator violated §31490.” (*Id.* at 31.)

Based on discussion with the parties at the hearing, the parties submitted the following updated proposed language for a proposed injunction:

9. . . . the Court hereby permanently enjoins each and every member of each of the Settlement Classes from filing or pursuing any claim or litigation against any of the persons and/or entities listed below in 9(a)-(d), asserting that compliance with the obligations imposed by this Order or either of the Agreements violates California Streets & Highways Code section 31490 or any other federal, state or local constitution, statute, rule, regulation or policy purporting to limit the disclosure of personally identifiable information:

- a. Any and all Released Parties (as defined in Section 2.26 of the TCA Agreement);
- b. Any and all Released Parties (as defined in Section 2.26 of the 3M Agreement);
- c. OCTA and Cofiroute, together with their respective officers, agents, employees and attorneys;
- d. Any other person or entity who provides information to the Class Administrator pursuant to this Order, together with their respective officers, agents, employees and attorneys.

(See Attached Revised Proposed Order at 6.) The Special Master acknowledges the parties' stated need for an injunction of this kind in the very unique circumstances presented here, and finds that the scope of their proposed injunction appears appropriate. The Special Master does not provide any opinion on the enforceability of the injunction, but rather simply relies on the parties' joint agreement that an injunction according to their agreed, proposed language should be entered. The Special Master accordingly **RECOMMENDS** that Judge Wright enter the proposed injunction.

6. RELEASE

At the hearing, the Special Master reviewed the language of the releases in the two proposed settlement agreements with the parties. See Dkt. No. 585-4 (3M Proposed Settlement Agreement) §§ 14.01–14.04; Dkt. No. 585-5 (TCA Proposed Settlement Agreement) §§ 15.01–15.04. As requested at the hearing, the parties engaged in further discussions and submitted proposed release language that addressed the Special Master's comments. The Special Master has reviewed the parties' proposed modified release language and recommends finding that it is appropriate given the nature of this case such that preliminary approval of the agreements should be granted.

7. PROPOSED TIMELINE UP TO FINAL APPROVAL HEARING

Plaintiffs proposed the following schedule up to the final approval hearing. At the December 10, 2020 hearing, the parties further clarified some of these deadlines with the Special Master.

| Event | Date |
|--|---|
| Defendants provide notice of the Settlements to the appropriate federal and state officials, as required by the Class Action Fairness Act (CAFA) | Within 10 days of the filing of the motion (at the hearing, the parties stated that this deadline was met.) |
| Notice Date (Date when Notices begin to issue) | 91 st day after Judge Wright's issuance of Preliminary Approval Order |
| Deadline to Submit Claim Forms | 84 Days from the Notice Date |

| | |
|--|--|
| Deadline to Object to one or both Settlements | 84 Days from the Notice Date |
| Deadline to Request Exclusion from one or both Settlements | 84 Days from the Notice Date |
| Deadline to Submit Motion for Attorneys' Fees, Costs, and Service Awards | 14 Days prior to the Objection Deadline |
| Deadline to Submit Motion for Final Approval | No later than 28 days before the Final Approval Hearing and no earlier than 14 days after the Objection Deadline |
| Final Approval Hearing before Special Master | At Least 42 Days after the Objection Deadline |

The Special Master notes that the parties should strongly consider sharing the costs of a court reporter for the final approval hearing, particularly so that the record accurately reflects comments provided by objectors, if any.

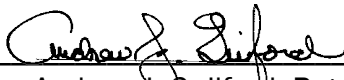
7. CONCLUSION

The Special Master **RECOMMENDS GRANTING** Plaintiffs' motion for preliminary approval of class action settlement. The Special Master will work with the parties to schedule a date, time, and place for a hearing on a motion for final approval after the Court has considered any objections to this report and determined whether to adopt it.

In addition to the adoption of this report, the Special Master **RECOMMENDS** that Judge Wright sign the attached updated proposed order for preliminary approval of class action settlement, which was jointly submitted by the parties.

THUS, THIS IS ISSUED.

Dated: December 30, 2020



Hon. Andrew J. Guilford, Ret.
Special Master

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7 **UNITED STATES DISTRICT COURT**

8 **CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION**
9

10 IN RE: TOLL ROADS LITIGATION
11

12 PENNY DAVIDI BORSUK; DAVID
13 COULTER; EBRAHIM E. MADHA;
14 TODD QUARLES; TODD
15 CARPENTER; LORI MYERS; DAN
16 GOLKA; and JAMES WATKINS on
17 behalf of themselves and all others
18 similarly situated,

19 Plaintiffs,

20 vs.

21 FOOTHILL/EASTERN
22 TRANSPORTATION CORRIDOR
23 AGENCY; SAN JOAQUIN HILLS
24 TRANSPORTATION CORRIDOR
25 AGENCY; ORANGE COUNTY
26 TRANSPORTATION AUTHORITY;
27 3M COMPANY; BRiC-TPS LLC;
28 RHONDA REARDON; MICHAEL
KRAMAN; CRAIG YOUNG; SCOTT
SCHOEFFEL; ROSS CHUN;
DARRELL JOHNSON; LORI
DONCHAK; COFIROUTE USA, LLC;
and DOES 3-10; inclusive,

Defendants

Case No: 8:16-cv-00262-ODW(ADSx)

Hon. Otis D. Wright II

**REVISED [PROPOSED] ORDER
GRANTING PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENTS**

Date: December 10, 2020

Time: 10:30 a.m.

Location: Virtual

Special Master: Hon. Andrew J. Guilford
(ret.)

ORDER GRANTING PRELIMINARY APPROVAL

On August 27, 2020, Plaintiffs and Defendants Foothill/Eastern Transportation Corridor Agency, San Joaquin Hills Transportation Corridor Agency, Michael Kraman, Craig Young, Scott Schoeffel, Ross Chun, Rhonda Reardon, and BRiC-TPS, LLC (collectively “TCA”) entered into a Settlement Agreement and Release (“TCA Agreement”), after two arms-length mediations, one with the assistance of mediator Robert Kaplan, and the second with mediator Rachel Ehrlich, Esq.¹ Also on August 27, 2020, Plaintiffs and Defendant 3M Company (“3M”) entered into a Settlement Agreement and Release (“3M Agreement”), after two arms-length mediations with the assistance of mediator Robert Kaplan, Esq. Collectively, the TCA Agreement and the 3M Agreement will be referred to as the Agreements, and the settlements reached in those Agreements will be referred to as the Settlements.

On November 4, 2020 Plaintiffs moved this Court, pursuant to Federal Rule of Civil Procedure (“Rule”) 23(e), for an order preliminarily approving the Settlements upon the terms and conditions set forth in the respective Agreements. The Motion was referred to the Special Master, Judge Andrew Guilford (ret.) (see Dkt. 582), and a hearing on the Motion occurred on December 10, 2020. Special Master Guilford issued a Report and Recommendation recommending granting the Motion for Preliminary Approval of the Settlements.

After carefully considering Plaintiffs’ Motion for Preliminary Approval and accompanying declarations; the Agreements, including the accompanying Exhibits; Special Master Guilford’s Report and Recommendation; and the applicable law, the Court finds that:

¹ Unless otherwise defined, all terms used herein have the same meanings as set forth in the Agreements.

1 1. The proposed Settlements are fair, reasonable, and adequate, and the
2 Court will likely be able to approve them under Rule 23(e)(2) and enter judgment on
3 them. The proposed Settlements do not improperly grant preferential treatment to any
4 segment of the TCA Settlement Class or the 3M Settlement Class (together, the
5 “Settlement Classes”). The proposed Settlements are sufficient to warrant sending
6 notice to the respective class members about the Settlements. The procedures for
7 establishing and administering the benefits provided by the proposed Settlements and
8 for notice to class members satisfy Rule 23 and due process.

9 2. The Court finds and determines that it will likely be able to certify the
10 Settlement Classes for purposes of judgment on the settlement proposals under Rule
11 23(b)(3) of the Federal Rules of Civil Procedure, because: (a) members of each
12 Settlement Class are so numerous that joinder of all members would be impracticable,
13 (b) there are questions of law and fact that are common to each Settlement Class, and
14 those questions of law and fact common to the Settlement Class predominate over any
15 questions affecting any individual class member; (c) the claims of the Plaintiffs are
16 typical of the claims of the Settlement Classes they seek to represent for purposes of
17 settlement; (d) a class action on behalf of each Settlement Class is superior to other
18 available means of adjudicating this dispute; and (e) Plaintiffs and Class Counsel are
19 adequate representatives of the Settlement Classes. Defendants retain all rights to
20 assert that this action may not be certified as a class action, other than for settlement
21 purposes.

22 3. The Court has reviewed the class notices for each Settlement Class and
23 the methods for providing notice and has determined that the parties will employ
24 forms and methods of notice that constitute the best notice practicable under the
25 circumstances; are reasonably calculated to apprise class members of the terms of the
26 Settlements and of their right to participate in them, object, or opt-out; are reasonable
27 and constitute due, adequate, and sufficient notice to all persons entitled to receive
28

1 notice; and meet all applicable requirements of Rule 23, the United States
2 Constitution, and due process.

3 **Accordingly, IT IS HEREBY ORDERED that:**

4 1. The Motion for Preliminary Approval is **GRANTED**. The Court
5 preliminarily approves the Settlements.

6 2. The Court hereby certifies, for settlement purposes only:

7 a. A 3M Settlement Class consisting of: All individuals whose PII
8 was provided by 3M or TCA to any other individual or entity from April 13, 2015 to
9 June 30, 2015, including:

- 10 • Any person with a transponder account with a Toll Agency
11 whose PII was sent by 3M or TCA from April 13, 2015 to June
12 30, 2015 to another Toll Agency (interoperability transmissions);
- 13 • Any person who used any of the TCA Toll Roads whose PII was
14 sent by 3M or TCA to a third party from April 13, 2015 to June
15 30, 2015 in connection with efforts to collect tolls or penalties
16 (collection transmissions); and
- 17 • Any person whose PII was sent by 3M or TCA to a third party
18 from April 13, 2015 to June 30, 2015 for any reason other than
19 those listed above (other transmissions).

20 Excluded from the 3M Settlement Class are: (1) employees of 3M, including
21 their current and former directors, officers and counsel; (2) any entity that has a
22 controlling interest in 3M; (3) 3M's affiliates and subsidiaries; and (4) the judge to
23 whom this case is or was assigned, any member of the judge's immediate family, and
24 any member of the judge's staff.

25 b. A TCA Settlement Class consisting of: All individuals whose PII
26 was provided by 3M or TCA to any other individual or entity from April 13, 2015
27 through 30 days after the date of this order, including:

- 28 • Any person with a transponder account with a Toll Agency

1 whose PII was sent by 3M or TCA from April 13, 2015 through
2 30 days after the date of this order to another Toll Agency
3 (interoperability transmissions);

- 4 • Any person who used any of the TCA Toll Roads whose PII was
5 sent by 3M or TCA to a third party from April 13, 2015 through
6 30 days after the date of this order in connection with efforts to
7 collect tolls or penalties (collection transmissions); and
- 8 • Any person whose PII was sent by 3M or TCA to a third party
9 from April 13, 2015 through 30 days after the date of this order
10 for any reason other than those listed above (other
11 transmissions).

12 Excluded from the TCA Settlement Class are: (1) employees of TCA
13 Defendants, including their current and former directors, officers and counsel; (2)
14 any entity that has a controlling interest in TCA Defendants; (3) TCA Defendants'
15 affiliates and subsidiaries; and 4) the judge to whom this case is or was assigned, any
16 member of the judge's immediate family, and any member of the judge's staff.

17 3. TCA Class Representatives. For purposes of the TCA Settlement only,
18 the Court preliminarily finds and determines, pursuant to Rule 23(a) of the Federal
19 Rules of Civil Procedure, that Plaintiffs Penny Davidi Borsuk; David Coulter; Todd
20 Carpenter; Lori Myers; Dan Golka; Todd Quarles; and Ebrahim E. Madha will fairly
21 and adequately represent the interests of the Class in enforcing their rights in the
22 action and appoints them as Class Representatives. The Court preliminarily finds that
23 they are similarly situated to absent Settlement Class Members and therefore typical
24 of the Class, and that they will be adequate Class Representatives.

25 4. 3M Class Representatives. For purposes of the 3M Settlement only, the
26 Court preliminarily finds and determines, pursuant to Rule 23(a) of the Federal Rules
27 of Civil Procedure, that Plaintiffs Penny Davidi Borsuk; David Coulter; Todd
28 Carpenter; Lori Myers; and Dan Golka will fairly and adequately represent the

1 interests of the Class in enforcing their rights in the action and appoints them as Class
2 Representatives. The Court preliminarily finds that they are similarly situated to
3 absent Settlement Class Members and therefore typical of the Class, and that they will
4 be adequate Class Representatives.

5 5. Class Counsel. For purposes of the Settlements, the Court appoints Helen
6 I. Zeldes of Schonbrun Seplow Harris Hoffman & Zeldes, LLP; Blake J. Lindemann
7 of Lindemann Law APC; and Michael J. Flannery of Cuneo Gilbert & LaDuca, LLP
8 as Class Counsel to act on behalf of each Settlement Class and the respective Class
9 Representatives with respect to the respective Settlements. The Court authorizes Class
10 Counsel to enter into the Settlements on behalf of the respective Class Representatives
11 and Settlement Classes, and to bind them all to the duties and obligations contained
12 therein, subject to final approval by the Court of the Settlements.

13 6. Administration. Epiq Class Action & Claims Solutions, Inc is appointed
14 as Class Administrator to administer the notice procedure and the processing of claims
15 for the Settlement Classes, under the supervision of Class Counsel.

16 7. Class Notice. The form and content of the proposed Notice of Class
17 Action Settlement (“Long Form Notice”), the Email Notice, Mail Notice, and
18 Publication Notice are hereby approved. The Parties and Class Administrator may
19 amend the Class Notice documents as necessary to add dates, correct errors, and
20 improve the information provided to Settlement Class Members consistent with the
21 guidance provided by the Special Master.

22 8. Cofiroute USA, LLC (“Cofiroute”), and the Orange County
23 Transportation Authority (“OCTA”) are hereby ordered to provide to the Class
24 Administrator, in an electronically searchable and readable format, the names, email
25 addresses and, if necessary (i.e., if an email address is unavailable or if the Class
26 Administrator notifies Cofiroute that an email was returned as undeliverable) the last
27 known mailing addresses of OCTA account holders who used their OCTA FasTrak
28 account to pay for a toll on a toll road operated by TCA between April 13, 2015 and

1 the thirtieth day after the date of this Order. TCA is hereby ordered to provide to the
2 Class Administrator, in an electronically searchable and readable format, information
3 to be identified by TCA in TCA's discretion, that the Class Administrator will use to
4 determine the names, last known email address, and last known mailing addresses
5 held by Settlement Class Members, to the extent TCA determines that such
6 information exists in its reasonably available computerized account records. The
7 Court finds that the provision of the foregoing information by OCTA, Cofiroute, and
8 TCA to the Class Administrator is necessary so that reasonable notice can be given to
9 the class, as required by state and federal constitutional provisions and FRCP 23, and
10 so the Class Administrator can verify membership in the Settlement Classes. The
11 Court further finds and orders that compliance with this Order by OCTA, TCA, and/or
12 Cofiroute will not and does not violate California Streets & Highways Code section
13 31490 or any other federal, state or local constitution, statute, rule, regulation or policy
14 purporting to limit the disclosure of personally identifiable information.

15 9. To effectuate this Order and to ensure adequate notice is provided to the
16 members of the Settlement Classes, and in accordance with both the Court's general
17 authority to protect its jurisdiction and the All Writs Act (28 USC § 1651), the Court
18 hereby permanently enjoins each and every member of each of the Settlement Classes
19 from filing or pursuing any claim or litigation against any of the persons and/or
20 entities listed below in 9(a)-(d), asserting that compliance with the obligations
21 imposed by this Order or either of the Agreements violates California Streets &
22 Highways Code section 31490 or any other federal, state or local constitution, statute,
23 rule, regulation or policy purporting to limit the disclosure of personally identifiable
24 information:

25 a. Any and all Released Parties (as defined in Section 2.26 of the
26 TCA Agreement);

27 b. Any and all Released Parties (as defined in Section 2.26 of the 3M
28 Agreement);

1 c. OCTA and Cofiroute, together with their respective officers,
2 agents, employees and attorneys;

3 d. Any other person or entity who provides information to the Class
4 Administrator pursuant to this Order, together with their respective officers, agents,
5 employees and attorneys.

6 10. The Class Administrator shall send the applicable Class Notice as
7 provided by the respective Agreements via: (i) electronic mail, to the most recent
8 email address of all persons in the respective Settlement Classes for whom such
9 information is reasonably available from the computerized records of OCTA, TCA or
10 Cofiroute; (ii) first class mail, to the most recent mailing address of all persons in the
11 respective Settlement Classes for whom there was no reasonably available email
12 address or whose email notice was returned as undeliverable and for whom such
13 mailing address is reasonably available from the computerized records of OCTA,
14 Cofiroute or TCA; and (iii) via publication and social media ads for members of the
15 interoperability transmissions subgroups of the respective Settlement Classes for
16 whom no email or mailing address is reasonably available to OCTA, Cofiroute or
17 TCA. The Notice will advise the respective class members of their ability to update
18 their email address and/or mailing address with the Class Administrator.

19 11. The Class Administrator shall treat the records of class members as
20 confidential and shall not disclose all or any portion of those records to any person or
21 entity except as authorized by Court order. The Class Administrator shall use the
22 records containing class member information solely for the purposes of providing
23 notice to class members, verifying claim forms, and calculating and paying settlement
24 awards. No copies of files containing the records may be made, nor may the records
25 be utilized by the Class Administrator for any other purpose not specified in this
26 Order.

27 12. Settlement Website. By the respective Settlement Notice Dates, the Class
28 Administrator will maintain and administer a dedicated Settlement Website

1 containing class information and related documents. At a minimum, such documents
2 will include the Agreements and attached exhibits, E-mail Notice, Mail Notice, this
3 Preliminary Approval Order, all submissions regarding final settlement approval, any
4 motion(s) for attorney's fees, costs, and/or service awards for the respective Class
5 Representatives, and the Final Approval Order. The Settlement Website will permit
6 members of the respective Settlement Classes who elect to do so to register online to
7 receive (a) email notice that the Court has granted Final Approval of the Settlements,
8 (b) updates on the deadlines to submit Requests for Exclusion and make Objections,
9 and (c) the status of payments under the terms of the Settlements. The Settlement
10 Website will be taken down and rendered inaccessible by the Final Distribution Date.

11 13. Claims. All claims must be postmarked or submitted electronically
12 within **eighty-four (84) days after the Settlement Notice Date ("Claims Deadline")**
13 as specified by the respective Agreements. Any class member who does not timely
14 and properly submit a claim within the time provided for shall be forever barred from
15 sharing in the distribution of the proceeds of the respective Settlements, unless
16 otherwise agreed by the Parties or ordered by the Court, but will in all other respects
17 be subject to and bound by the provisions of the Agreements, the releases contained
18 therein, this Order, the Final Judgment, and the Final Approval Order.

19 14. The Class Administrator shall review and process each claim to
20 determine whether it qualifies for a settlement award, and in what amount, in
21 accordance with the terms of the respective Agreements. Claims that do not meet the
22 submission requirements may be rejected. Prior to rejecting a claim, in whole or in
23 part, the Class Administrator shall communicate with the claimant in writing to give
24 the claimant a reasonable opportunity to remedy any deficiencies in the claim.

25 15. Exclusions from the Settlement. Members of the Settlement Classes who
26 wish to exclude themselves from one or both of the Settlement Classes must advise
27 the Class Administrator by providing a written Request for Exclusion. The Request
28 for Exclusion must be postmarked no later than **eighty-four (84) days after the**

1 **Settlement Notice Date** (the “Exclusion Deadline”). In it, the class member must
2 state his or her full name and address and must state that he or she wishes to be
3 excluded from the Settlement(s). Any member of a Settlement Class who submits a
4 valid and timely Request for Exclusion will not be a final class member of the
5 Settlement he/she is excluded from and will not be bound by the terms of the
6 Agreement(s) (but will be bound by the injunction in paragraph 9, above). All
7 members of the Settlement Classes who do not submit a timely, valid Request for
8 Exclusion, however, will be bound by the Agreement(s) and the Judgment, including
9 the releases and covenant not to sue.

10 16. **Objections.** Any Settlement class member who intends to object to one
11 or both Settlements must file a written Objection with the Court, located at 350 W. 1st
12 Street, Los Angeles California, 90012, Courtroom 5D, no later than **eighty-four (84)**
13 **days after the Settlement Notice Date** (the “Objection Deadline”). In the written
14 Objection, the Settlement class member must state his or her (1) full name and
15 address; (2) account number with the TCA, if one exists; and (3) any other proof of
16 Settlement Class membership if such proof exists. The written Objection must also
17 state the reasons for the Settlement class member’s Objection and indicate whether
18 he or she intends to appear at the Final Approval Hearing on his or her own behalf or
19 through counsel. Any documents supporting the Objection must be attached to the
20 Objection. The Parties shall have the right to obtain document discovery from and
21 take the deposition of any objector relevant to the Objection. Any Settlement class
22 member who has timely filed an Objection and indicated an intent to appear may
23 appear at the Final Approval Hearing, either in person or through an attorney hired at
24 the Settlement class member’s own expense, to object to the fairness, reasonableness,
25 or adequacy of one or both of the Settlements.

26 17. **Declaration of Class Administrator.** No later than fourteen (14) calendar
27 days before the Final Approval Hearing, the Class Administrator shall file with the
28

1 Court and serve on counsel for all Parties a declaration stating that the Notice required
2 by this Order has been completed.

3 18. Motion for Final Approval. The motion for final approval shall be filed
4 and served **at least twenty-eight (28) days before the Final Approval Hearing.**
5 Any replies to any Objections shall be filed and served at least **fourteen (14) calendar**
6 **days prior to the Final Approval Hearing.**

7 19. The motion for attorneys' fees and costs and Service Awards shall be
8 filed **at least two weeks before the Objection and Exclusion Deadlines.** Any replies
9 to any Objections shall be filed and served at least **fourteen (14) calendar days prior**
10 **to the Final Approval Hearing.**

11 20. Defendants shall bear no responsibility for any application for attorneys'
12 fees and costs and service awards, and such matters will be considered separately from
13 the fairness, reasonableness, and adequacy of the Settlement. At or after the Final
14 Approval Hearing, the Court shall determine whether any application for attorneys'
15 fees and costs to Class Counsel and any service awards to Court-appointed Class
16 Representatives shall be approved.

17 21. All reasonable expenses incurred in identifying and notifying Class
18 Members, as well as administering the Settlements, shall be paid in accordance with
19 the terms set forth in the Agreements.

20 22. The Court preliminarily approves Section 14 of the 3M Settlement
21 Agreement and Section 15 of the TCA Settlement Agreement in which the TCA, the
22 OCTA, Cofiroute, other Toll Agencies, 3M, and the Class Administrator are released
23 from any and all claims that any Settlement class member could assert arising out of
24 or in any way related to the transmission, collection, or use of the Settlement Class
25 Member Information pursuant to the Settlement Agreements to administer the
26 Settlements.

27 23. The Special Master, Hon. Andrew J. Guilford (ret.), shall hold a Final
28 Approval Hearing on a date selected by the Special Master at Judicate West, to

1 determine: (a) whether the Settlements on the terms and conditions provided for in
2 the Agreements are fair, reasonable and adequate to class members and should be
3 finally approved by the Court; (b) whether a judgment should be entered; (c) whether
4 Class Counsel should be awarded attorneys' fees and costs, and if so, in what amount;
5 and (d) whether service awards should be awarded to the Court-appointed Class
6 Representatives, and if so, in what amount. The Special Master may postpone the
7 Final Approval Hearing and will provide notice of any such postponement on the
8 Class Administrator's website without further notice to class members. The Special
9 Master shall produce a Report and Recommendation as to whether he believes the
10 Settlements should be finally approved.

11 24. Neither the Agreements or any of their terms or provisions, nor any of
12 the negotiations or proceedings connected with the Settlements, whether or not
13 consummated, shall be construed as an admission or concession of any kind by any
14 of the Parties. Neither the Agreements or any of their terms or provisions, nor any of
15 the negotiations or proceedings connected with the Settlements, may be offered
16 against any of the Parties as evidence of, or construed as or deemed to be evidence of,
17 any presumption, concession or admission by any of the Parties regarding any issue
18 whatsoever including: (i) whether it was appropriate for class certification; (ii) the
19 validity of any allegation or claim that was, could have been or will be asserted against
20 any of the Defendants; (iii) liability, negligence, fault, or wrongdoing of any kind;
21 and (iv) the existence or scope of any damages.

22 25. The Court retains exclusive and continuing jurisdiction over the Parties
23 and the class members to consider all further motions and applications arising out of,
24 or connected with, the Agreements or related Settlement matters. The Court may
25 approve the Settlements with such modifications as may be agreed to by the Parties,
26 if appropriate, without further notice to the Settlement Classes. The Court shall also
27 retain jurisdiction with respect to the implementation and enforcement of the terms of
28 the Agreements, and all Parties hereto submit to the jurisdiction of the Court for

1 purposes of implementing and enforcing the Settlements embodied in the
2 Agreements.

3 26. All class members shall be bound by all determinations and judgments
4 of the Court in the Action concerning the Settlements and related matters, whether
5 favorable or unfavorable to the Settlement Classes.

6 27. All proceedings in this action relating to TCA, 3M, and BRiC shall be
7 stayed until further order of the Court, except for proceedings that may be necessary
8 to implement this Preliminary Approval Order, the Agreements, their Exhibits, or to
9 comply with or effectuate the terms and conditions of the Agreements.

10 28. Pending final determination of whether the proposed Settlements should
11 be approved, neither Plaintiffs nor any class member, directly or indirectly,
12 representatively, or in any other capacity, shall commence or prosecute against any of
13 the settling Defendants, any action or proceeding in any court or tribunal asserting
14 any of the respective Released Claims.

15 **IT IS SO ORDERED:**

16
17 Dated: _____, 2020

18 _____
19 Otis D. Wright II
20 *United States District Judge*
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PROOF OF SERVICE

**In Re Toll Roads Litigation
A267204**

I, the undersigned, an employee of Judicate West, located at 1851 E. First Street, Suite 1600, Santa Ana, CA 92705 declare under penalty of perjury that I am over the age of eighteen (18) and not a party to this matter or proceeding.

On December 30, 2020, I served the foregoing documents, described as:

**SPECIAL MASTER'S REPORT AND RECOMMENDATION REGARDING MOTION FOR
PRELIMINARY APPROVAL OF TWO CLASS ACTION SETTLEMENTS (DKT. NO. 585)**

to the following parties:

SEE ATTACHED MAILING LIST

- (☒) **BY E-MAIL** I caused the above-referenced document to be transmitted via electronic mail (e-mail) to the parties as listed on this Proof of Service
- (☐) **BY ELECTRONIC FILING** I caused such document to be sent via electronic service by submitting an electronic version of the document(s) to One Legal, LLC, through the user interface at www.onelegal.com.
- (☐) **BY FACSIMILE** I caused the above-referenced document to be transmitted via facsimile to the parties as listed on this Proof of Service. The document was transmitted by facsimile transmission and the transmission was reported as complete and without error.
- (☐) **BY PERSONAL SERVICE** I personally delivered the documents to the persons at the address (es): by leaving the documents at the person (s) office, in an envelope or package clearly labeled to identify the person(s) being served, with a receptionist or an individual in charge of the office.
- (☐) **BY UNITED STATES PARCEL SERVICE** I am readily familiar with the business' practice for collection and processing of correspondence and mailing with the United States Postal Service; such correspondence would be deposited with the United States Postal Service the same day of deposit with postage thereon fully prepaid at Nicole Baney, California in the ordinary course of business
- (☐) **STATE** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
- (☐) **FEDERAL** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **December 30, 2020**, at Santa Ana, California

Nicole Baney
Judicate West



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as of Wednesday, December 30, 2020

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Case Caption: In Re Toll Roads Litigation

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